INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	3
Argument	10
Conclusion	13

CITATIONS

Cases:

Calvaresi, et al. v. *United States*, 216 F. 2d 891, reversed, 348 U. S. 961	5
Cone v. *West Virginia Paper Co.*, 330 U. S. 212	11
Coy, United States ex rel. v. *United States*, 316 U. S. 342	2
Mattox v. *United States*, 146 U. S. 140	12
Remmer v. *United States*, 347 U. S. 227	9, 12, 13
Rubenstein v. *United States*, 214 F. 2d 667, certiorari denied, 348 U. S. 896	4
United States v. *Johnson*, 327 U. S. 106	11
United States v. *Mayer*, 235 U. S. 55	10
United States v. *Cora Janette McRae*, Crim. No. 13604 (D. Colo.)	7
United States v. *Robert Joseph Moss*, Crim. No. 13671 (D. Colo.)	7

Rules:

F. R. Crim. P., Rule 33	2
Revised Rules of Supreme Court, Rule 22 (2)	2

370250—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 543

IRVING M. RUBENSTEIN, A/K/A IRVING M. RUBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 16–23) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 10). The petition for a writ of certiorari was filed on November 28, 1955.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] Although petitioner originally styled his motion as one to vacate sentence under 28 U. S. C. 2255, the Court of Appeals, properly we believe, held that the motion would not lie under this section but could be entertained as a motion

QUESTION PRESENTED

Petit jurors who sat on petitioner's case had been questioned by Internal Revenue Agents and a grand jury several days prior to trial as to possible approaches made to them in connection with another unrelated case, and had revealed no knowledge of any such approaches. A *voir dire* examination prior to trial disclosed no bias or prejudice among the jurors. Nevertheless, reviewing the denial without a hearing of petitioner's motion to vacate after his conviction had been affirmed and service of his sentence begun, the Court of Appeals granted petitioner's prayer that he be given a hearing in the District Court to afford him an opportunity to show that such questioning had improperly affected the jury. The question presented is whether that order should be reviewed by this Court in the present posture of the case.

RULE INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court may grant a new trial to a defendant if required in the interest of jus-

---

for a new trial cognizable under Rule 33, F. R. Crim. P. (Pet. 19–21). Treating the proceeding as a motion for a new trial, the time for filing a petition for a writ of certiorari expired 30 days after the filing of the judgment of the Court of Appeals. Hence this petition would appear to be out of time. See Rule 22 (2), Revised Rules of the Supreme Court of the United States; *United States ex rel. Coy v. United States*, 316 U. S. 342.

tice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

Petitioner seeks review of an order of the United States Court of Appeals for the Tenth Circuit entered on September 1, 1955, which vacated the District Court's order denying his motion for a new trial and, on petitioner's application, remanded the case to that court with directions to hold a supplemental hearing on the issue of possibly prejudicial influence on the jury which had convicted him. The history of the case leading up to this petition may be summarized as follows:

Following a trial by jury in the United States District Court for the District of Colorado, petitioner was convicted under the first count of an indictment charging a willful attempt to evade income taxes for the year 1946, and on October 30, 1953, was sentenced to imprisonment for three

years and to pay a fine of $10,000. His conviction was affirmed on appeal, *Rubenstein* v. *United States,* 214 F. 2d 667 (C. A. 10), and certiorari was denied by this Court on December 6, 1954, 348 U. S. 896. On January 20, 1955, District Judge Ritter reduced the sentence from three to two years, conditioned upon payment of the $10,000 fine on or before February 2, 1955 (R. 5). The fine was paid and service of the sentence begun on January 30, 1955.

On February 8, 1955, petitioner filed a motion to vacate and set aside the judgment pursuant to 28 U. S. C. 2255, alleging that prior to the commencement of his trial on September 29, 1953, and without his knowledge or the knowledge of defense counsel, the members of the panel from which the jury in his case had been selected had been "questioned by United States Treasury agents as to whether or not they had been approached by anyone with reference to their jury service in the United States District Court, and that they were subsequently called as witnesses and questioned by the grand jury as aforementioned"; that such investigation of the jury panel resulted from a "hung" jury in a prior trial "involving certain defendants named Smaldone and others"; and that the questioning "constituted a form of intimidation on behalf of the Government and its agents and would of necessity have some effect upon the determinations and deliberations by the jury in defendant's case, and that by reason

thereof defendant did not and could not have had a fair and just trial before a fair and impartial jury as guaranteed by Amendments V and VI to the United States Constitution" (R. 6–9).

A stipulation of the parties, filed in the District Court for transmittal to the Court of Appeals (designated Supplemental Transcript of Record), reveals the following facts:

On June 2, 1953, a criminal tax case against one Eugene Smaldone came on for trial in the District Court for the District of Colorado. A mistrial was declared on June 12, 1953, and the case was again set for trial on September 21, 1953. In the meantime, a grand jury undertook an investigation of jury tampering in connection with the prior and pending Smaldone tax cases, as a result of which indictments were returned in September and October 1953, charging Eugene Smaldone, Clyde Smaldone and others with conspiracy and the substantive offenses of attempted bribery and obstruction of justice in approaching members of the jury panel.[2]

On or about September 23 and 24, 1953, members of the jury panel from which the jury selected to try the instant case was subsequently drawn were questioned by agents of the Internal

[2] The facts as to these charges, as developed at the later trial of the indictments commencing on October 29, 1953, are set forth in *Calvaresi, et al.* v. *United States*, 216 F. 2d 891 (C. A. 10), reversed, 348 U. S. 961 (Supp. R. 2–3).

Revenue Service as to whether they had been approached concerning their jury service. Nine of the jurors who tried this case were so questioned before the trial. One of these, Mr. G. Vane Golden, was questioned on September 23, 1953, as to whether anyone had contacted or talked to him regarding his jury service or recently offered him an unusually attractive financial deal, to which questions he replied in the negative. The remaining eight were questioned as to whether anyone had contacted or talked to them regarding their jury service. All replied in the negative. (Supp. R. 3.)

In addition to the questioning by the agents, the entire panel of petit jurors was questioned by the grand jury. The twelve jurors who tried petitioner's case were very briefly questioned on September 24 and 25, 1953. A copy of the transcript of the grand jury proceedings relating to these jurors is appended to the stipulation of the parties (Supp. R. 5–22). Each was asked whether he had been approached by anyone with reference to his activities as a juror, whether he had received any threats or promises, and whether he had received any information concerning such approaches or threats. In each case the answer was in the negative. In addition, Juror G. Vane Golden was asked whether he knew one Lawson (an individual involved in the Smaldone case). He said that he did but that he had not visited or had dealings with him. Juror

Daniel E. Perry was asked whether he knew the Smaldones. He replied that he knew of them only through eating in their restaurant. Juror Rea F. Fuerstock volunteered the information that she was related "in a vague round-about way through marriage" with the Smaldones but did not know them or anything about them (Supp. R. 3–4).

The questioning of each juror was short, occupying only a page or two of the transcript. None of the jurors who tried petitioner's case was actually connected in any way with the Smaldone case, and none had knowledge of any alleged improper approach to other jurors. No reference of any sort was made to petitioner's case or to any other case which intervened between the questioning and petitioner's case.[3]

Petitioner's case came on for trial on September 29, 1953. The transcript of the *voir dire* examination of the jurors (R. 11–24) indicates that the court first informed the array of the nature of the case, and then questioned them as to their occupations, any difficulty they had had with the Internal Revenue Service, and any possible bias from the nature of the case. Following the gen-

[3] The jury panel had served for other cases which intervened between the interrogation and the commencement of the trial of the instant case. Two such cases were *United States* v. *Cora Janette McRae*, Crim. No. 13604, and *United States* v. *Robert Joseph Moss*, Crim. No. 13671, both marihuana cases. Six jurors who sat in the instant case were members of the jury in the above trials.

eral questioning, each juror was individually questioned by the court to detect any bias or prejudice. Petitioner's counsel exercised his right to ten challenges. Following the individual examination, the court again asked the jury if there was anything about the case which would create bias or prejudice in their minds, or if any of them had ever had any personal difficulty with the Internal Revenue Service. Some of the jurors had had their income tax returns audited but none had experienced any difficulty of any kind. After all challenges had been made, one of the last admonitions the completed jury heard before taking the oath was in pertinent part as follows (R. 23):

> The COURT: Now, ladies and gentlemen of the jury, when you take the oath to serve as a juror in this case it will be your obligation to try the issues between the United States and the defendant fairly and impartially without any bias or prejudice, passion or sympathy of any nature at all.
>
> Now, I want to ask you ladies and gentlemen if there is any matter of any character or nature that anyone has in mind—and I am addressing this to each one of you individually, which you think might prejudice you from trying the issues fairly and impartially between the United States and this defendant? If there is any matter in the mind of any of you, or if there is any matter that you think might embarrass you to act as a juror, it is your duty now to inform the Court about that matter.

The case then proceeded to trial on September 29, 1953, and on October 2, 1953, a verdict of guilty was returned.

On February 23, 1955, District Judge Ritter denied petitioner's motion to vacate without a hearing (R. 9–10). On appeal, petitioner urged as error the refusal to grant him a hearing, and prayed that one be granted (Pet. 18). The Government opposed this, arguing that although the record, including the stipulation of the parties, showed that the jurors had been very briefly questioned by Internal Revenue agents and a grand jury several days prior to this and other intervening trials concerning their possible knowledge of approaches made to them in connection with an unrelated case, there had been a *voir dire* examination prior to this trial to detect any possible attitude of bias, and that none had been detected. The Government contended that a hearing was unnecessary in the absence of a showing by petitioner that the *voir dire* was less than an accurate canvas of the attitudes of the jurors.

On September 1, 1955, the Court of Appeals, largely on the authority of *Remmer* v. *United States,* 347 U. S. 227, vacated the order of the District Court. Treating petitioner's motion as one for a new trial on the ground of newly discovered evidence,[4] it remanded the case with di-

[4] Petitioner's motion did not raise issues going to the jurisdiction of the District Court, and therefore did not raise

rections to the District Court to hold a hearing to determine whether the incidents complained of affected, or reasonably tended to affect, the full and free exercise of the calm and informed judgment of any member or members of the jury, and if it should find that such incidents actually had or reasonably tended to have such effect, to grant a new trial (Pet. 16–23).

ARGUMENT

Petitioner argues that the Court of Appeals erred in ordering a hearing in the District Court on the question whether any of the jurors who judged his tax evasion case were prejudicially affected in that trial because they were questioned before trial as to possible tampering in another, unrelated case. He urges that the Court of Appeals should have held on the stipulated facts alone, without a hearing, that he was entitled to have his conviction set aside and a new trial ordered. The argument, particularly in the present posture of these proceedings, presents no basis for certiorari.

In the first place, the case is not ripe for review. The Court of Appeals has not finally determined whether petitioner is entitled to a new trial. All it has done, responsive to petitioner's request, is to decide that the District Court erred in refusing

---

issues cognizable on collateral attack. See *United States* v. *Mayer*, 235 U. S. 55, 69. The Government conceded, however, that the motion could be deemed one for a new trial. See fn. 1, *supra*, pp. 1–2.

to hear the merits of his claim and exercise its discretion after receiving evidence to show whether as a matter of fact the jury was improperly affected by the inquiries in question. And, as this Court has held, the question whether a new trial should be granted is for the determination of the trial judge in the first instance rather than the appellate tribunal. *United States* v. *Johnson,* 327 U. S. 106, 113; *Cone* v. *West Virginia Paper Co.,* 330 U. S. 212, 216–217. After petitioner is accorded the hearing he sought, he can, on the basis of the facts there developed, reassert any issues of law which remain in the case at that time. He is free then to present in the trial court his contention that the burden of proof should be upon the Government in this case to show absence of prejudicial influence on the jury.

It seems clear, in any event, that the facts now known do not require, as a matter of law, the grant of a new trial. The questioning of the jurors had no relevance to their duties in the instant case and was on its face unlikely to have influenced their decision. The questions were routine and, except for some specific references to the Smaldone case, colorless. (See Supp. R. 5–22.) At no time was the instant case mentioned or otherwise adverted to in name or substance. There was no statement made which could be construed as a suggestion or insinuation that any juror should do less than his duty in this or

any other case on which he might sit. When this case came on for trial the careful questioning by the trial judge of the jurors as a group and individually failed to elicit any trace of bias or prejudice toward the petitioner or the case. Petitioner cites no fact which tends to show that actual prejudice resulted.

Even in those cases, unlike this one, where an unauthorized contact "with a juror during a trial about the matter pending before the jury" is established, the mere fact of contact does not *ipso facto* require a new trial. There is only a rebuttable presumption of bias which shifts the burden to the Government, to show, on a hearing in the District Court, that no actual bias resulted. *Remmer* v. *United States,* 347 U. S. 227, 229; *Mattox* v. *United States,* 146 U. S. 140, 148–150. This Court in *Remmer* did not hold that the mere fact of contact required a new trial; it remanded the matter for hearing.[5] Here, even though there was no unauthorized contact with a juror "about the matter pending before the jury", and therefore

[5] While the *Remmer* case is again pending before this Court on writ of certiorari to the Court of Appeals for the Ninth Circuit (No. 156, this Term), the issue whether the particular evidence adduced in the supplemental hearing in that case was sufficient to overcome the presumption of prejudice arising from the extraneous jury contact during the trial about the very subject matter of the trial would seem to have no bearing on this case, at least in the present posture of this case.

no presumptive showing of bias, as in *Remmer,* the Court of Appeals followed this Court's precedent in remanding the case in order that the District Court might reexamine the issue on the basis of a complete record. Until the District Court has had an opportunity to pass on the issue and dispose of the motion by final order, no intermediate review by this Court would seem to be justified.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

DECEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955